(25,778)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 948.

S. F. KELLEY, TRUSTEE OF THE GIBRALTAR INVESTMENT AND HOME BUILDING COMPANY, BANKRUPT, APPELLANT,

vs.

THOMAS GILL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 26, 1917.

1-3 *Names and Addresses of Attorneys.*

For Appellant: Ralph E. Esteb, Esq., and Wm. B. Ogden, Esq., 711-715 American Bank Building, Los Angeles, California.

For Appellee: Thomas Gill, A. Abrahams, Esq., 611-21 Washington Building, Los Angeles, California.

4 In the District Court of the United States, Southern District of California, Southern Division.

S. F. KELLEY, Trustee of Gibraltar Investment and Home Building Company, a Corporation, Bankrupt, Complainant,

vs.

FREDERICKA AARONS et al., Defendants.

Citation.

UNITED STATES OF AMERICA, *ss:*

To Thomas Gill, Greetings:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, United States of America, on the 26 day of March, 1917, pursuant to an order allowing an appeal entered in the Clerk's office of the District Court in and for the Southern District of California, Southern Division, in that certain suit in equity No. C-26, civil in equity, wherein you are a defendant and appellee, and S. F. Kelley, Trustee of the Gibraltar Investment and Home Building Company, a corporation, Bankrupt, is complainant and appellant, to show cause, if any there be, why an order of said court made and entered on January 11, 1917, against said appellant in said order, allowing appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Oscar A. Trippet, United States District Judge of the Southern District of California, of the Southern Division, this 25th day of Jan. 1917.

OSCAR A. TRIPPET,
District Judge for Southern District of California.

5 [Endorsed:] Original. No. C-26 in Equity. In the District Court of U. S., Southern District of Cal., Southern Division. S. F. Kelley, Trustee, etc., Plaintiff, vs. Fredericka Aarons et al., Defendants. Citation. Received copy of within Citation this — day of Jan. 1917. A. L. Abrahams, per ——, Solicitor for Thomas Gill.

Filed Jan. 25, 1917. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, Deputy Clerk.

6 In the District Court of the United States in and for the Southern District of California, Southern Division.

Equity.

No. C-26.

S. F. KELLEY, Trustee of Gibraltar Investment and Home Building Company, a Corporation, Bankrupt, Complainant,

vs.

FREDERICKA AARONS, THOMAS GILL, and About Three Thousand Other Defendants, Defendants.

7 In the District Court of the United States, Southern District of California, Southern Division.

No. C-26.

S. F. KELLEY, Trustee of Gibraltar Investment and Home Building Company, a Corporation, Bankrupt, Complainant,

vs.

FREDERICKA AARONS, THOMAS GILL, and About Three Thousand Other Defendants, Defendants.

Stipulation for Agreed Statement on Appeal.

It is hereby stipulated and agreed by and between the parties hereto, by their respective solicitors, that the annexed statement of the case contains all the matters and things essential to a decision of the questions involved in the appeal herein pending by the Appellate Court, and

It is further stipulated and agreed that in accordance with Rule 77 of the Practice in Equity in courts of the United States, that upon the filing of such statement in the office of the Clerk of the District Court, the same shall be treated as superseding, for the purpose of this appeal all parts of the record other than the order from which the appeal is taken, and together with such order or decree shall be copied and certified to the Appellate Court as the record on Appeal.

Dated at Los Angeles, California, in said District this 19 day of January, 1917.

RALPH E. ESTEB,
Solicitor for S. F. Kelley, Trustee.

A. L. ABRAHAMS,
Solicitor for Thomas Gill.

8 The foregoing stipulation and annexed statement of the case having this day been presented to the undersigned Judge of the District Court of the United States, Southern District of California, Southern Division, the same was and is hereby approved.

Dated this 19 day of January, 1917.

OSCAR A. TRIPPET, *Judge.*

9 *Agreed Statement on Appeal.*

In the District Court of the United States, Southern District of California, Southern Division.

No. C-26.

S. F. KELLEY, Trustee of Gibraltar Investment and Home Building Company, a Corporation, Bankrupt, Complainant,

vs.

FREDERICKA AARONS, THOMAS GILL, and About Three Thousand Other Defendants, Defendants.

Bill of Complaint.

To the Honorable the Judges of the District Court of the United States for the Southern District of California, Southern Division:

S. F. Kelley, as Trustee in Bankruptcy of the Estate of the Gibraltar Investment and Home Building Company, a corporation, Bankrupt, a citizen resident of the State of California, brings this his Bill of Complaint against Fredericka Aarons, Thomas Gill (and about three thousand other defendants).

* * * * * * *

All citizens and residents of the State of California, and of the Southern District thereof, and thereupon your orator complains and says:

I.

Your orator shows and alleges that the plaintiff above named is the duly elected, qualified and acting Trustee in Bankruptcy of the Gibraltar Investment and Home Building Company, a corporation organized under the laws of the State of California; that he is a citizen and resident of the State of California; that said cor-

10 poration was adjudged a bankrupt on the 14th day of August, 1915, by order of this Honorable Court in a proceeding herein pending entitled "In the Matter of Gibraltar Investment and Home Building Company, a corporation, Bankrupt," and numbered 1858 on the calendar of said court.

II.

That your orator brings this Bill under Section 2 of the United States Bankruptcy Act of 1898 and the Amendments thereof, to enforce the order of this court dated February 25, 1916, made and entered in the Bankruptcy — entitled "In the Matter of Gibraltar Investment and Home Building Company, a Corporation, Bankrupt."

III.

Your orator further shows and alleges that this is a suit in equity instituted by the Trustee in Bankruptcy for the purpose of reducing to possession certain choses in action, to-wit, unpaid balance of subscription to the capital stock of the Bankrupt, under authority given by order entered in the bankruptcy proceedings aforesaid, and is not such a suit as the said bankrupt might or could have brought had the proceedings in bankruptcy not been instituted.

IV.

That during all of the dates herein mentioned the Gibraltar Investment and Home Building Company, a corporation, was and now is a corporation organized under and by virtue of the Laws of the State of California, and having its office and principal place of business at Los Angeles, California, and having capital stock to the amount of $2,000,000, divided into 20,000,000, shares, of the par value of Ten Cents (10¢) each.

V.

That ever since the 11th day of December, 1914, and for a long time prior thereto, and now, the following named defendants were and are the owners and holders of that certain number of
11 shares of the capital stock of said corporation, and have paid thereon the several amounts, and owe an unpaid balance on stock set opposite their respective names, as follows:

Name.	No. of shares.	Amount paid in.	Balance unpaid.
Fredericka Aarons	200	$11.00	$25.00
* * * * * * *			
Thomas Gill	50000	3000.00	7000.00

(And about three thousand other defendants.)

* * * * * * *

VI.

The the defendant-, and each of them, at the time they subscribed for the *b*umber of shares hereinbefore set forth, promised, under-

took and agreed to pay therefor in installments upon specified dates such an amount as that, after deducting the amount of payments set opposite their respective names, would leave a balance due thereon as shown in paragraph V hereof, and that thereafter the said corporation incurred the liabilities which are now the subject of claims filed and claimed by creditors in the hereinbefore mentioned bankruptcy proceeding. That the whole amount of the subscription price due from each of said defendants has long since become due and now is unpaid as set forth in paragraph V hereof.

VII.

That on or about the 11th day of December, 1914, an involuntary petition in Bankruptcy was filed in the District Court of the United States, in and for the Southern District of California, Southern Division, entitled "In the Matter of the Gibraltar Investment and Home Building Company, a corporation, Bankrupt," and that thereafter such proceedings were had in said Bankruptcy proceedings that on the 14th day of August, 1915, an order was duly
12 made and entered by which said Gibraltar Investment and Home Building Company, a Corporation, was adjudged a bankrupt; that thereafter at the first meeting of creditors of the bankrupt on, to-wit, the 16th day of November, 1915, your orator, S. F. Kelley, was duly and regularly elected by said creditors Trustee of the Estate of said Bankrupt; and that thereupon he duly qualified as such Trustee, and ever since has been, and now is, the duly elected qualified and acting Trustee of the Gibraltar Investment and Home Building Company, a corporation, bankrupt.

VIII.

That on the 25th day of February, 1916, the District Court of the United States, in and for the Southern District of California, Southern Division, upon petition of the complainant made and entered an order that the stockholders of said Bankrupt pay into the hands of the Trustee on or before the 20th day of March, 1916, the whole of the unpaid balance due from them on stock in said Bankrupt corporation, and in the event of failure, neglect or refusal of any or all of said delinquent stockholders to pay the said balance due from them, the Trustee was authorized and directed to forthwith institute a suit in equity to enforce the collection thereof, and that notice of said order was served upon each of the subscribers to the capital stock to be affected thereby, by mailing a copy of said order to each of said subscribers, and by publication of said order in a newspaper printed and published in the County of Los Angeles, State of California, at least once previous to the day aforesaid, and at least ten days prior thereto.

IX.

That the stockholders, mentioned in paragraph V hereof, notwithstanding said order and notice thereof, have failed, refused and

neglected to pay their respective indebtedness on account of
13 the unpaid balance due on their stick in the bankrupt corporation, and that there is now due, owing and unpaid from said stockholder-, defendants above named, to the plaintiff herein the respective amounts set opposite their names in paragraph V hereof in the column headed "Bal. Unpaid."

In consideration whereof, and forasmuch as your orator has no adequate relief at law, but only in a court of equity, where the amount of each defendant's liability can be fixed and determined, and where matters of this and a similar nature are properly cognizable and relievable,

Wherefore, that your orator may have that relief which he can only obtain in a court of equity, and that the said defendants may answer in the premises, he now prays the court:

1. That it be ordered, adjudged and decreed, that the defendants and each of them pay into the complainant such several amounts upon their unpaid subscriptions to the capital stock of the Gibraltar Investment and Home Building Company as shall be equal to the unpaid amounts due on their several stock subscriptions.

2. That the plaintiff have judgment against the defendants and each of them for such unpaid stock subscriptions and the costs and expenses of this suit, in the following named amounts, to-wit:

Name.	Amount unpaid.
Fredericka Aarons	$25.00
* * * * * * *	
Thomas Gill	7,000.00

(And about three thousand other defendants.)

* * * * * * *

3. That your orator may have such further and other relief and decree in the premises as to the court may seem proper and required by the principles of equity and good conscience. And may it
14 please your Honors to grant unto your orator a Writ of Subpœna of the United States of America, directed to said defendants and each of them, and such others as shall, in the discretion of your Honors, appear necessary to the determination and hearing of this case, commanding them on a day certain, and under a certain penalty therein to be named, to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

RALPH E. ESTEB,
Solicitor for Complainant.

Office and Post Office Address 711-715 American Bank Building, Los Angeles, California.

15 In the District Court of the United States in and for the Southern District of the State of California, Southern Division.

In Equity.

No. C-26.

S. F. KELLEY, as Trustee in Bankruptcy of Gibralter Investment & Home Building Company, a Corporation, Plaintiff,

vs.

FREDERICKA AARONS et al., Defendants.

Motion of Thomas Gill, One of the Defendants Herein, to Dismiss the Bill of Complaint Heretofore Filed Herein.

This defendant not confessing all or any part of said Bill of Complaint to be true, moves the Court to dismiss said Bill of Complaint upon the following grounds and for the following reasons:

1. The plaintiff has not in and by said Bill made or stated such a case as entitles him in a court of Equity to any relief *f* from or against this moving defendant, touching the matters contained in said bill or any of such matters.

2. That it appears from said Bill that the jurisdiction of this Court is dependent upon the alleged fact that this action is a suit in equity instituted by the Trustee in Bankruptcy, and that it is not such a suit as the said Bankrupt might or could have brought had the proceedings in bankruptcy not been instituted, and that such fact is not shown for that the plaintiff alleges that he is suing to recover unpaid balances on subscriptions for stock of the Bankrupt, from which it apears that such action is based upon contracts enforceable by the Bankrupt had the bankruptcy proceedings not been instituted, by action, and it does not appear that such Bank-

16 rupt might or could have brought said suit in this Court had not bankruptcy proceedings been instituted, and it appears that said action is not an action for the recovery of property instituted under Section 60, Sub-Division B, Section 67, Sub-Division E., or Section 70, Sub-Division E. of the Bankruptcy Act.

A. L. ABRAHAMS,
Solicitor for Defendant Thomas Gill.

(Endorsed:) No. C-26. In Equity. In the District Court of U. S. Southern District of Cal., Southern Division. S. F. Kelley, Trustee, etc., Plaintiff, vs. Fredericka Aarons, et al., Defendants. Stipulation for Agreed Statement on Appeal. Filed Jan. 25, 1917. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, Deputy Clerk.

17 At a Stated Term, to wit, the January Term, A. D. 1917, of the District Court of the United States of America in and for the Southern District of California, Southern Division, Held at the Court-room thereof, in the City of Los Angeles, on Thursday, the Eleventh Day of January, in the Year of Our Lord One Thousand Nine Hundred and Seventeen.

Present: The Honorable Benjamin F. Bledsoe, District Judge.

Equity.

No. C-26.

S. F. KELLEY, Trustee, etc., Complainant,

vs.

FREDERICKA AARONS et al., Defendants.

This cause having heretofore been submitted to the court for its consideration and decision on certain motions of defendants to dismiss the bill of complaint; the court, having duly considered the same and being fully advised in the premises, now hands down its opinion, and it is accordingly ordered, that the motion of defendant Thomas Gill to dismiss the bill of complaint be, and the same hereby is granted, upon the sole ground that this court is without jurisdiction to entertain the suit, the court holding in abeyance its ruling upon all other motions made by defendants, for the reasons, upon the conditions and for the period of time announced in said opinion.

18 In the District Court of the United States, Southern District of California, Southern Division.

S. F. KELLEY, Trustee of Gibraltar Investment and Home Building Company, a Corporation, Bankrupt, Complainant,

vs.

FREDERICKA AARONS and About Three Thousand Other Defendants, Defendants.

BLEDSOE, *District Judge:*

A petition was filed in this court in the Bankruptcy proceeding above referred to, setting forth that the above named bankrupt was a corporation organized under the laws of the State of California, with a capital stock of $2,000,000, divideed into twenty million shares of the par value of ten cents each; that from the claims on file it would be necessary to raise the sum of about $150,000 in order that all of the indebtedness of the said bankrupt and the cost of administration might be paid, and that the only property in the estate other than the unpaid subscriptions to capital stock consisted of an interest in a

conditional sale contract of problematical value; that over four million dollars of the capital stock of the corporation had been subscribed for and purchased, but a part only of that agreed to be purchased had been paid for, and that there remained unpaid on said purchase price and long past due, according to the terms of the contracts to purchase, about the sum of $480,971.23; that a large majority of the said subscribers and purchasers of said stock are insolvent and a great many others are nonresidents of the State
19 of California, and that it would require the collection of the full amount remaining due on the stock from solvent resident parties in order that sufficient money might be realized therefrom to satisfy the claim of creditors and pay the cost of administration. Wherefore it was asserted that it was absolutely necessary that payment be ordered of all unpaid subscriptions.

Pursuant to such pe-ition, an order was made, in accordance with the usual practice obtaining, for the payment to the trustee of the unpaid balance due from the various subscribers to capital stock and in the event of failure to pay such balance the trustee was authorized and directed "to institute a suit in equity" to enforce the collection thereof, etc.

Such suit has been commenced in this court against the stockholders referred to, approximating three thousand in number, in equity, and motions have been made to dismiss the bill of complaint upon various grounds, only one of which, however, will be adverted to at any length herein.

Despite the able and insistent arguments of counsel for defendants, I am persuaded that the suit is properly brought on the equity side of the court. The fact that it is a proceeding to enforce the collection of a trust fund and also because of the great number of defendants and the fact that only such an amount as will be necessary to pay the debts and expenses of administration of the bankrupt corporation can, in any event, be collected from the solvent stockholders, makes it necessary that one suit in equity should be prosecuted in order that by an equitable collection and distribution of the assets such as is possible only in a court of equity, complete relief may be had and complete justice may be done in the premises. (See Sawyer v. Hoag, 17 Wall. 610; Patterson v. Lynde, 106 U. S. 519).

The question of the jurisdiction of this court, however, to entertain the suit at all, has given me the greatest concern. In-
20 dividually, for reasons of economy, efficiency and convenience, adverted to in re Baudouine, 101 Fed. 576. p. 577, I have felt that the law ought to be such that this court should be vested with jurisdiction of such a suit as this. However, it is the province of this court to declare not what the law ought to be but what it is, and it is laid down by legislative and judicial authority.

Complainant, in support of the claim that this court has jurisdiction, cites in re Crystal Springs Co., 96 Fed. 945, Skillin v. Magnus, 162 Fed. 689, in re Baudouine, supra, Murphy v. Hoffman Co., 211 U. S. 562, and 7 Corpus Juris, 9, 255. It will be noticed that each one of these cases was decided previously to the comprehensive

and controlling decision of the United States Supreme Court in Bardes v. Hawardan Bank, 178 U. S. 524, except Skillin v. Magnus, supra, in which Judge Hough of the District Court expressly stated that he was required to follow the ruling of the Circuit Court of Appeals in the Baudouine case. The Bardes case holds substantially that Clause 7 of Section 2 of the Bankruptcy Act is limited in its effect by the controlling language of Section 23*b*, and that, differentiated in that respect from the Bankruptcy Act of 1867, except with the consent of a proposed defendant, a court of the United States has no jurisdiction to entertain a plenary suit prosecuted by the Tr*su*tee, save in those instances where the bankrupt itself might have brought such suit in such court, if proceedings in bankruptcy had not be instituted. Complainant's counsel meet this situation by asserting that this is a suit brought on the equity side of the court and therefore was not the sort or kind of a suit which the bankrupt itself could have brought as for a recovery of these unpaid subscriptions. In other words, the bankrupt would have been limited to a suit at law as against such individual delinquent subscribers, and for that reason jurisdiction of this suit in
21 equity is not denied to the courts of the United States under Section 23*b*, but is expressly conferred on those courts through the medium, and because of the comprehensive language, of Cl*a*use 7 of Section 2 of the Bankruptcy Act.

I confess that at first blush I was attracted by this suggestion but upon more mature consideration, I am persuaded that it will not bear analysis. The idea seems to have been engendered in the language of the court in the Crystal Springs Case, supra, where it was said: "Some suggestions have been made as to where suits should be brought on failure to comply with the call. According to Patterson v. Lynde, 106 U. S. 519, there should be one suit in equity for the adjustment of the whole matter as to all within the jurisdiction. This is not such a suit as the bankrupt could have brought. Scovill v. Thayer, 105 U. S. 143. Therefore it is not within Section- 23*a* and 23*b* of the Bankrupt Act, limiting actions by the Trustee to where the bankrupt could sue." Scovill v. Thayer does not, however, go to the extent claimed for it in the contention made. It was decided in that case, not that a suit in equity was a suit which the bankrupt could not bring, but that, because of the fact that there was an agreement between the bankrupt corporation and its stockholders *that* there should be no liability as against the stockholders and in favor of the corporation as for unpaid subscriptions, in that particular instance, it would have been impossible for the bankrupt itself to have brought suit against the stockholders as for any such unpaid subscription. Such a situation does not exist in the present case. On the contrary as I read the language of the complainant, and taking, as I conceive I may, judicial notice of the contents of the petition upon which the order to sue was based, there were positive agreements entered into by each of the stockholders in the case at bar with the corporation that the
22 balances of the unpaid subscriptions should be paid at speci-

fied dates. Scovill v. Thayer, then, upon the facts, is not similar to, or authority for the proposition asserted in, this case.

In addition, in the Bardes case the point was sought to be made (p. 537) that the Federal Court had jurisdiction there because, it being a suit to set aside a conveyance made in fraud of his creditors by the bankrupt, the bankrupt himself could not have brought such a suit to set aside his conveyance voluntarily made, and that, in consequence, in virtue of the language of Sec. 23*b*, the trustee was authorized to bring the suit in the federal court. In answer to this contention and in denial of the jurisdiction of the federal court the Supreme Court said: "But the clause concerns the jurisdiction only, and not the merits, of a case; the forum in which a case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision. The bankrupt himself could have brought a suit to recover property, which he claimed as his own and against one asserting an adverse title in it; and the incapacity of the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action, and not the jurisdiction of the court to entertain and determine it." So in this case. While it may be true that the bankrupt corporation could not have sued in equity as for the recovery of these unpaid balances, it could, admittedly, and if bankruptcy had not intervened it probably would, have sued at law to effect their recovery. The mere form in which the action is cast, assuming such form to have been either permissive or obligatory, is not, in my judgment, under the limitations prescribed in the Bardes Case, determinative of the jurisdiction of this court. The statute says that the trustee shall sue only "where the bankrupt * * * might have" sued had no bankruptcy proceedings been instituted. There is no implication, to be drawn from this language that the trustee, if he sues in equity, may sue in a different court than the bankrupt, who could have sued only at law, might have employed.
23 Under the inhibition of the statute, jurisdiction is determined by a consideration of the question as to the court where the bankrupt might have sued, not as to the form of action in which the bankrupt might have clothed its suit. So, paraphrasing the language of the court in the Bardes case, just quoted, the clause is determinative of "the forum in which a cause may be tried" and not the form of action in which it might be brought.

I conclude therefore that the bankrupt, having no right to bring such a suit as this in this court, in any form of action, the jurisdictional essentials of this court not existing, the trustee is not authorized to bring the suit in this court merely because he clothes his action in a form not open to the bankrupt itself. The reasoning of the Bardes case is to the effect that Congress intended, ex industria, to limit the jurisdiction of this court to controversies strictly and properly part of the proceedings in bankruptcy, and to deny jurisdiction, except upon consent, in independent suits. This intention of Congress, all-controlling in the premises, must not be laid out of consideration.

In re Newfoundland Syndicate, 196 Fed. 443, cited in Corpus

Juris, supra, and relied upon by the complainant herein as supporting the claim of jurisdiction of this court, expressly holds, as I read the case, that though the Bankruptcy court would have complete jurisdiction to consider and determine with respect to the necessity for a call upon the stockholders for their unpaid subscriptions in aid of a liquidation of the debts of the bankrupt corporation, yet, page 447, "the enforcement of said assessment against the stockholders alleged to be liable thereon, however, is plenary in its nature and, except with their consent, cannot be made in the Bankruptcy court. Sec. 23*b*, Bankruptcy Act. In the suit to collect such assessment the defendant is entitled to make all defenses that re-
24 late to him in his individual as distinguished from his corporate capacity, such as that he is not a stockholder or that he has fully paid for the stock taken." This statement seems to be supported by cases cited and is in consonance with my own view, that the proceeding as against the individual stockholder upon his refusal to pay his delinquent subscription, is not a mere proceeding in bankruptcy for the collection of the assets of the estate, but a suit plenary in its nature and subject to all the limitations expressed in Sec. 23*b* of the Bankruptcy Act. These conclusions seem to find support in some of the text books, viz: Collier on Bankruptcy, p. 489; Remington on Bankruptcy, Sec. 1694 a*n*d also Sec. 977. See also Clevinger v. Moore, 58 Atl. 88 p. 89, where the precise point seems to have been passed upon adversely to complainant's contention herein by the Supreme Court of New Jersey.

Upon the whole case it may be said that I am not entirely free from doubt as to the question of the jurisdiction of this court. Aside from the reasons given and the authorities cited hereinabove, in the presence of such a doubt and owing to the limited jurisdiction of this court, I should feel ordinarily that, unless its jurisdiction were shown to exist, jurisdiction should be denied. It occurs to me as not improper, however, to give the complainant in such case the benefit of such doubt in substantial fashion. The question of jurisdiction can be determined in advance of a long and perhaps expensive trial on the merits. By taking up merely one record, upon one motion, by an abbreviated record, economy both of time and of expense can be effected. Imbued with this thought, the court will therefore grant the motion to dismiss as against the complainant and in favor of one of the defendants herein and withold a ruling upon the other motions, say, sixty days. If within that time appropriate means are taken to obtain a review of this order,
25 a further stay will be granted until the question has been determined on appeal. If, however, at the end of such period no steps have been taken to seek such review, or within that period complainant signifies an intention not to appeal from the order now made, an appropriate order will then be entered granting each and all of the motions to dismiss.

The motion of Thomas Gill, one of the defendants, to dismiss is granted, upon the sole ground that this court is without jurisdiction to entertain the suit. A ruling upon all other motions made by other defendants, upon various grounds enumerated, will be held

in abeyance for sixty days pursuant to the suggestion hereinabove made.

January 11th, 1917.

(Endorsed:) No. C-26 Eq. U. S. District Court, Southern District of California, Southern Division. S. F. Kelley, Trustee for the Gibraltar Inv. & Home Bldg. Co., a corp., bankrupt, Complainant, vs. Fredericka Aarons et al., Defendants. Order of court allowing Motion of one Defendant to Dismiss. Filed Jan. 11, 1917. Wm. M. Van Dyke, Clerk, by T. F. Green, Deputy Clerk.

26 In the District Court of the United States, Southern District of California, Southern Division.

S. F. KELLEY, Trustee for Gibraltar Investment and Home Building Company, a Corporation, Bankrupt, Complainant,

vs.

FREDERICKA AARONS et al., Defendants.

Petition for Allowance of Appeal.

The above named complainant, S. F. Kelley, Trustee of Gibraltar Investment and Home Building Company, a corporation, bankrupt, conceiving himself aggrieved by the order made and entered by the said court in the above entitled cause on January 11, 1917, in sustaining the motion of defendant, Thomas Gill, to dismiss complainant's bill of complaint out of this court, does hereby appeal from said order to the Supreme Court of the United States, for the reasons specified in the Assignment of Error filed herewith under and according to the Laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which complainant shall give and furnish upon such appeal; and that a citation issue, as provided by law, and prays that this appeal may be allowed and that the Transcript of Record, papers and proceedings upon which said order was made duly authenticated in accordance with the rules of equity promulgated by the Supreme Court of the United States and statutes made and provided may be sent to the Supreme Court of the United States.

Dated: Jan. 17, 1917.

WM. B. OGDEN AND
RALPH ESTEB,
Solicitors for Complainant.

27 (Endorsed:) No. C-26. In Equity. In the District Court of U. S., Southern District of Cal., Southern Division. S. F. Kelley, Trustee, etc., Plaintiff vs. Fredericka Aarons, et al., Defendants. Petition for allowance of Appeal. Filed Jan. 25, 1917. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, Deputy Clerk. Received copy of the within Allowance of Appeal this 25th day of January, 1917. A. L. Abrahams, Solicitor for Thomas Gill.

28 In the District Court of the United States, Southern District of California, Southern Division.

No. C-26.

S. F. KELLEY, Trustee for Gibraltar Investment and Home Building Company, a Corporation, Bankrupt, Complainant,

vs.

FREDERICKA AARONS et al., Defendants.

Assignment of Error.

Comes now the complainant in the above entitled cause, by Ralph E. Esteb, his solicitor, and assigns the following error upon which he will rely upon his appeal from the order heretofore made and entered by this Honorable Court on the 11th day of January, 1917, in the above entitled cause, to-wit:

I.

That the Court erred in rendering and entering its order sustaining the motion of Thomas Gill to dismiss Complainant's Bill of Complaint for want of jurisdiction, for the reason that said order is contrary to law.

In order that the foregoing Assignment of Error may be made of record, the Complainant presents the same to the court and petitions that disposition may be made thereof, in accordance with the law of the United States thereunto provided.

Wherefore, the said complainant prays, that said order of this court made and entered on the 11th day of January, 1917, sustaining the motion of Thomas Gill to dismiss complainant's Bill of Complaint be reversed, and that the United States District Court, for the

29 Southern District of California, Southern Division, be directed to enter an order setting aside in entirety the said order of January 11th, 1917, and that it enter an order overruling the motion of Thomas Gill to dismiss.

Respectfully submitted,

WM. B. OGDEN,
RALPH E. ESTEB,
Solicitor- for Complainant.

(Endorsed:) No. C. 26 in Equity. In the District Court of U. S. Southern District of Cal. Southern Division. S. F. Kelley, Trustee, etc., Plaintiff,-vs.-Fredericka Aarons, et al., Defendants. Assignment of Error. Received copy of the within Assignment of Error this — day of January, 1917. A. L. Abrahams, Solicitor for Thomas Gill. Filed Jan. 25, 1917. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, Deputy Clerk.

30 In the District Court of the United States, Southern District of California, Southern Division.

S. F. KELLEY, Trustee of Gibraltar Investment and Home Building Company, a Corporation, Bankrupt, Complainant,

vs.

FREDERICKA AARONS et al., Defendants.

Order Allowing Appeal.

In the above entitled cause, the complainant, through his solicitors, Wm. B. Ogden and Ralph E. Esteb, Esquires, having filed his petition for an Order allowing an Appeal from the order of this court made on the 11th day of January, 1917, sustaining the Motion of Thomas Gill to Dismiss the Bill of Complaint herein, and it appearing to the court that said complainant has filed Assignment of Error:

It is hereby ordered, that an appeal to the Supreme Court of the United States from the order in said cause made and entered on the 11th day of January, 1917, be and the same is hereby allowed; and that the bond for costs be and the same is hereby fixed at the sum of One Hundred Dollars.

It is further ordered, that upon the filing of such security a certified transcript of record and proceedings herein, as stipulated by counsel for the respective parties hereto and the proceedings herein be transmitted to the Supreme Court of the United States, in accordance with the rules of equity by the Supreme Court of the United States promulgated, and in accordance with the statutes made and provided.

31 Dated January 25th, 1917.

OSCAR A. TRIPPET,
District Judge.

(Endorsed:) No. C-26 in Equity. In the District Court of the U. S. Southern District of California, Southern Division. S. F. Kelley, Trustee of Gibraltar Investment and Home Building Company, a Corporation, Bankrupt, Complainant,-vs.-Fredericka Aarons, et al., Defendants. Order Allowing Appeal. Received Copy of the within Order this 25 day of January, 1917. A. L. Abrahams, Solicitor for Thomas Gill. Filed Jan. 25, 1917. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, Deputy Clerk.

32 In the District Court of the United States, Southern District of California, Southern Division.

S. F. KELLEY, Trustee of Gibraltar Investment and Home Building Company, a Corporation, Bankrupt, Complainant,

vs.

FREDERICKA AARONS et al., Defendants.

Bond on Appeal.

Know all men by these presents: That we, S. F. Kelley, Trustee of the Gibraltar Investment and Home Building Company, a corporation, Bankrupt, and J. E. La Lone and Mrs. Meta Season, as sureties, are held and firmly bound unto Thomas Gill, one of the defendants in the above entitled action in the penal sum of One Hundred Dollars, to be paid to the said Thomas Gill, his heirs and assigns, for the payment of which sum well and truly to be made, we bind ourselves, heirs, executors and administrators firmly by these presents.

The condition of the above obligation is such that whereas the said complainant, S. F. Kelley, Trustee of the Gibraltar Investment and Home Buiiding Company, a corporation, bankrupt, of the above entitled action is about to take an appeal to the Supreme Court of the United States, to reverse an order made, rendered and entered on the 11th day of January, 1917, by the District Court of the United States, for the Southern District of California, Southern Division, in the above entitled cause, in which the motion of the defendant, Thomas Gill, to dismiss the complaint of the said complainant herein was sustained.

33 Now, therefore, the condition of the above obligation is such that if said S. F. Kelley, Trustee of the Gibraltar Investment and Home Building Company, a corporation, Bankrupt, shall prosecute his said appeal to effect and answer all costs, if he fail to make his plea good, then this obligation shall be void; otherwise to remain in full force and effect.

In witness whereof, the seals and signatures of the principal and sureties are hereunto affixed at Los Angeles, California, this 19th day of January, 1917.

S. F. KELLEY, [SEAL.]
Trustee of Gibraltar Investment and Home Building Company, a Corporation, Bankrupt.
J. E. LA LONE. [SEAL.]
MRS. META SEASON. [SEAL.]
——— ———. [SEAL.]

Approved this 25 day of January, 1917.

TRIPPET,
District Judge.

UNITED STATES OF AMERICA,
Southern District of Cal., County of Los Angeles, ss:

J. E. La Lone, —— ——, and —— ——, the sureties named in the above and foregoing bond, being duly sworn, each for himself says: that he is a free-holder and resident within said state, and is worth the sum of One Hundred Dollars, over and above ali his debts, and liabilities, exclusive of property exempt from execution.

J. E. LA LONE.
—— ——.
—— ——.

Subscribed and sworn to before me this 19th day of January, 1917.

[SEAL.] MARY E. MORRIS,
Notary Public in and for the County of Los Angeles, State of California.

34 UNITED STATES OF AMERICA,
Southern District of Cal., County of Los Angeles, ss:

Mrs. Meta Season, —— —— and —— ——, the sureties named in the above and foregoing bond, being duly sworn, each for *himself* says: that *he* is a free-holder and resident within said State, and is worth the sum of One Hundred ($100) Dollars, over and above all *his* debts and liabilities, exclusive of property exempt from execution.

MRS. META SEASON.
—— ——.
—— ——.

Subscribed and sworn to before me this 19 day of January, 1917.

[SEAL.] NORMA G. BERRYMAN,
Notary Public in and for the County of Los Angeles, State of California.

(Endorsed:) No. C-26 in Equity. In the District Court of U. S. Southern District of Cal. Southern Division. S. F. Kelley, Trustee, etc., Plaintiff, vs. Fredericka Aarons et al., Defendants. Bond on Appeal. Filed Jan. 25, 1917. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, Deputy Clerk.

35 In the District Court of the United States, Southern District of California, Southern Division.

S. F. KELLEY, Trustee for Gibraltar Investment and Home Building Company, a Corporation, Bankrupt, Complainant,

vs.

FREDERICKA AARONS et al., Defendants.

Præcipe for Preparation of Transcript.

Under Equity Rule 75.

To the Clerk of the Court:

You will please incorporate in the Transcript on Appeal from this court to the Supreme Court of the United States:

The Order Allowing Appeal on behalf of complainant herein made and entered on the — day of January, 1917, together with the following portions of the record of this cause in equity, to-wit:

A certified copy of the agreed condensed statement on appeal approved by this court on the 19th day of January, 1917, with the stipulation for Agreed Statement on Appeal attached thereto.

The Assignment of Error filed herein.

Names and addresses of the solicitors and counsel for the parties herein.

The Citation on appeal herein.

The Petition for Order allowing Appeal herein.

The Order Allowing Appeal herein.

The Minute Order Sustaining the Motion of Thomas Gill to Dismiss Complainant's Bill of Complaint herein.

Opinion of Judge Bledsoe.

36 Very respectfully,

WM. B. OGDEN &
RALPH E. ESTEB,
Solicitors and Counsel for Complainant-Appellant.

Due service and receipt of a copy of the within Citation is hereby admitted this — day of January, 1917.

——— ———,
——— ———,
Solicitors for Defendant Thomas Gill.

(Endorsed:) No. C-26. In the District Court of U. S. Southern District of Cal., Southern Division. S. F. Kelley, Trustee, etc., Plaintiff, vs. Fredericka Aarons, et al., Defendants. Præcipe for Preparation of Transcript. Received copy of the within Præcipe this 25 day of January, 1917. A. L. Abrahams, Solicitor for Thomas Gill. Filed Jan. 25, 1917. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, Deputy Clerk.

37 In the District Court of the United States in and for the Southern District of California, Southern Division.

In Equity.

No. C-26.

S. F. KELLEY, Trustee for Gibraltar Investment and Home Building Company, a Corporation, Bankrupt, Complainant,

vs.

FREDERICA AARONS, THOMAS GILL, and About Three Thousand Other Defendants, Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing thirty six typewritten pages, numbered from 1 to 36 inclusive, and comprised in one volume, to be a full, true and correct copy of the Stipulation for Agreed statement on Appeal, Agreed Statement on Appeal, Minute order, granting Motion to Dismiss, Opinion of the Court, Petition for Allowance of Appeal, Assignment of Error, Order Allowing Appeal, Bond on Appeal and Præcipe for Transcript of Record on Appeal, in the above and therein entitled action, and that the same together constitute the record in said action as specified in the said Præcipe filed in my office on behalf of the Appellant by his Attorney of Record.

I do further certify that the cost of the foregoing record is $17.20, the amount whereof has been paid me by S. F. Kelley, Trustee
38 of Gibraltar Investment and Home Building Company, a Corporation, Bankrupt, the Appellant herein.

In testimony whereof I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 29th day of January in the year of our Lord One Thousand Nine Hundred and Seventeen and of our Independence the One Hundred and Forty-first.

[Seal of the U. S. District Court, Southern Dist. of California.]

WM. M. VAN DYKE,
Clerk of the District Court of the United States of America in and for the Southern District of California.

Endorsed on cover: File No. 25,778. S. California D. C. U. S. Term No. 948. S. F. Kelley, Trustee of the Gibraltar Investment and Home Building Company, Bankrupt, appellant, vs. Thomas Gill. Filed February 19th, 1917. File No. 25,778.

BRIEF OF APPELLANT

SUPREME COURT
OF THE
UNITED STATES.

October Term 1917.

No. [redacted] 431

S. F. Kelly, Trustee of the Glendora Investment & Realty Building Company, Bankrupt,

Appellant,

vs.

Pioneer Oil,

Appellee.

Appeal from the District Court of the United States for the Southern District of California.

[redacted]

[redacted]

Attorneys for Appellant.

INDEX.

Cases Cited.

(25,778.)

BRIEF OF APPELLANT.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM 1916.

No. 948.

S. F. Kelley, Trustee of the Gibraltar Investment and Home Building Company, Bankrupt,

Appellant,

vs.

Thomas Gill,

STATEMENT OF THE CASE.

This is a suit in equity brought by the appellant as trustee in bankruptcy of the Gibraltar Investment and Home Building Company, a corporation organized under the laws of the state of California, and formerly transacting business in Los Angeles, in the Southern District of California; the object of the suit is to collect unpaid balances due from about three thou-

sand stockholders on subscriptions to stock of the corporation; the several subscriptions are contained in separate contracts executed by the several defendants, who are each residents of the state of California, and of the Southern District thereof.

The allegations of the bill touching jurisdiction are as follows [Tr. pp. 4, 5]:

II.

"That your orator brings this bill under section 2 of the United States Bankruptcy Act of 1898 and the amendments thereof, to enforce the order of this court dated February 25, 1916, made and entered in the bankruptcy entitled 'In the Matter of Gibraltar Investment and Home Building Company, a corporation, bankrupt.'"

III.

"Your orator further shows and alleges that this is a suit in equity instituted by the trustee in bankruptcy for the purpose of reducing to possession certain choses in action, to-wit, unpaid balance of subscription to the capital stock of the bankrupt, under authority given by order entered in the bankruptcy proceedings aforesaid, and is not such a suit as the said bankrupt might or could have brought had the proceedings in bankruptcy not been instituted."

* * *

VIII.

"That on the 25th day of February, 1916, the District Court of the United States, in and for the Southern District of California, Southern Division, upon petition of the complainant made and entered an order that the stockholders of said bankrupt pay into the hands of the trustee on or before the 20th day of March, 1916, the whole of the unpaid balance due from

them on stock in said bankrupt corporation and in the event of failure, neglect or refusal of any or all of said delinquent stockholders to pay the said balance due from them, the trustee was authorized and directed to forthwith institute a suit in equity to enforce the collection thereof, and that notice of said order was served upon each of the subscribers to the capital stock to be affected thereby, by mailing a copy of said order to each of said subscribers, and by the publication of said order in a newspaper printed and published in the county of Los Angeles, state of California, at least once previous to the day aforesaid, and at least ten days prior thereto."

The sole question involved in this case is whether or not the District Court of the United States has jurisdiction to hear and determine a suit in equity, brought by the trustee in bankruptcy of a corporation, against the subscribers to its capital stock for the unpaid portion of their respective subscription contracts.

The appeal comes to this court from an order of the District Court of the United States for the Southern District of California, granting the motion of Thomas Gill, one of the defendants, to dismiss the bill upon the one and only ground that the court was without jurisdiction. The assignment of error upon which appellant relies is the first and only stated assignment, to-wit:

ASSIGNMENT OF ERROR.

That the court erred in rendering and entering its order sustaining the motion of Thomas Gill to dismiss complainant's bill of complaint for want of jurisdiction for the reason that said order is contrary to law.

POINTS.

For the purposes of this argument, we admit: (1) that the bankrupt corporation, had proceedings in bankruptcy not been instituted, could not have brought separate actions at law upon the several contracts of subscription in the District Court of the United States for the Southern District of California; (2) that it could have brought such actions in the Superior Court of the state of California.

We deny, however, that it could have brought one suit in equity against all the defendants, either in the District Court of the United States or the Superior Court of the state of California.

Appellant, therefore, makes the following points:

I.

It is not such a suit as the bankrupt might have brought had bankruptcy proceedings not been instituted.

II.

That it is a proceeding in bankruptcy to reduce the assets of the bankrupt to possession.

ARGUMENT AND AUTHORITIES.

I.

It Is Not Such a Suit as the Bankrupt Might Have Brought Had Bankruptcy Proceedings Not Been Instituted.

The jurisdiction of the District Court of the United States to hear and determine this suit in equity is predicated by the complainant in his bill of complaint on section 2 of the Bankruptcy Act of 1898, and its amendments. The pertinent parts of that section read as follows:

> "* * * The District Courts of the United States in the several states * * * are hereby made courts of bankruptcy and are hereby invested * * * with such jurisdiction in law and equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."
>
> "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." (Amendment of 1903 and 1910.)

The exception referred to in subdivision (7) of section 2, above set forth, does not appear in this section of the act, but has been construed to mean the exception contained in section 23, which reads as follows:

> "Sec. 23(a). The United States Circuit Court shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants."
>
> "(b). Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty-subdivision 8; section sixty-seven e; and section seventy, subdivision e."

It is a mere spinning of a spider's web to say that the bankrupt *could* have brought the action notwithstanding it would have been defeated. Section 23 (b) had no such puerile idea to convey. It was intended to, and does mean, where the bankrupt might *lawfully* have brought its action and where the court would have had

jurisdiction. Viewed in this light, the question is solved, because, the bankrupt could not have lawfully brought a suit of this kind in any court; no court would have had legal or equitable jurisdiction to hear and determine in one action all the matters here at issue. The Bardes case (178 U. S. 524) mentioned by the court below in its written opinion, does not meet the question raised here, nor are the quotations made by the lower court pertinent to the question presented on the motion. The Bardes case held that when the trustee brought an action against a stranger to the proceeding, holding adversely to the trustee, to recover property conveyed in fraud of the creditors, that he was limited in the prosecution of the suit to the court that would have had jurisdiction of an action brought by the bankrupt, notwithstanding the bankrupt would have been without judgment because his action was vitiated with fraud. There, if bankruptcy proceedings had not been instituted, the state court would have had *jurisdiction* to determine the question and hear the evidence, and to render judgment against the plaintiff. It had jurisdiction of the subject matter and of the parties. But the question is different here. The jurisdiction is lacking.

No court has jurisdiction of any cause until a proper pleading by way of declaration, or complaint has been presented to it tendering an

issue triable under the constitutional powers of such court. (U. S. v. Aredondo, 6 Pet. 691, 709.) In the abstract a court may be said to have jurisdiction of this or that cause of action, but, it does not have jurisdiction of the *particular* remedial proceeding until a petition bill, or declaration, containing appropriate allegations is presented to it. Such pleading must present one or more issues triable at one and the same time. If a declaration were presented naming two defendants, strangers in law, against one of whom judgment upon a promissory note was asked, and against the other for damages for malicious prosecution, it would be good upon general demurrer or demurrer for want of jurisdiction of either party, and yet the court could not be said to have the power to hear and determine such an action, that is, the jurisdiction to try the two causes of action, and render separate judgments against the separate defendants in the one proceeding. So that jurisdiction is something more than the mere authority to try and determine litigation concerning certain classes of subject matter, and between certain classes of persons. Jurisdiction is also dependent upon the proper framing of the pleadings and issues. In this view of the law, no court either state or Federal could be said to have had jurisdiction of the issues tendered by the present bill of complaint if brought by the

bankrupt, because no court had the power to render judgment or enter a decree as between all the parties.

Rhode Island v. Massachusetts, 12 Pet. 657, 718;
Miller v. Curry, 53 Cal. 665.

It is a point beyond contradiction that the bankrupt could not have brought one suit in equity against all of the defendants upon the several causes of action growing out of the individual subscription contracts of the several defendants, either in the District Court or the state courts. It had an adequate remedy at law against each upon his contract and there was no ground for the interposition of equity whereby all the defendants might have been sued in equity, in the one proceeding.

Nor is there any adequate ground for the bringing of a single suit in equity against all the defendants, by the trustee, himself, unless that right is given him by some provision of the Bankruptcy Act. As the Act of 1898 was originally enacted, he stood in the shoes of the bankrupt (Collier on Bankruptcy, 662 a, 662 b) and his rights would be no broader and no greater than those of the bankrupt prior to the adjudication. The insufficiency of the trustee's powers was recognized and the amendment to section 47, giving to the trustee all the rights

and powers of a creditor holding a lien by legal or equitable proceedings and of a judgment creditor with execution returned unsatisfied, was enacted. Hence, after amendment, the trustee had a right of action that never existed before, either in the bankrupt or trustee, and the jurisdiction to hear and determine such a proceeding was a jurisdiction never existing prior thereto, and it thereby became a proceeding in bankruptcy as something created by the act itself, and of which the District Court would have jurisdiction by virtue of the broad powers granted in section 2.

If, then, the bankrupt could not have brought a single suit in equity against all of the defendants, had bankruptcy proceedings not interevened, either in the state or Federal courts, and if that right is given to the trustee in bankruptcy solely by provision of the Bankruptcy Act itself, it follows that a new right of action has been created, and makes this suit for its enforcement, one not included within the terms of section 23 b, for this proceeding by bill in equity against all the defendants is not such a suit as the bankrupt could have brought, had proceedings in bankruptcy not intervened. It is a proceeding not existing at the time of its enactment and therefore not within its terms. Not being within the exception, the District

Court has jurisdiction thereof by virtue of sub. 7 of sec. 2 of the act.

It would seem that this question might have been passed upon many times since the enactment of the Bankruptcy Act of 1898, but such is not the case. So far as we have been able to discover, the question has been directly passed upon in the decisions in three cases only, in all of which, however, the ruling has been in support of the position here taken by this appellant.

> "Some suggestions have been made as to where suit should be brought on failure to comply with the call. According to *Patterson v. Lynde*, 106 U. S. 519, 1 Sup. Ct. 432, there should be one suit in equity for adjustment of the whole matter as to all within the jurisdiction. This is not such a suit as the bankrupt could have brought. *Scovill v. Thayer*, 105 U. S. 143. Therefore, it is not within sections 23 a and 23 b of the bankrupt act, limiting actions by the trustee to where the bankrupt could sue. This leaves the jurisdiction of such a case as this, arising under the bankrupt law, in the United States courts where the bankrupt estate is being administered. The equities of the parties can all readily be made to appear, and the jurisdiction of such a case more properly belongs."
>
> *Re* Crystal Springs Bottling Co., 96 Fed. 946.

> "Under Bankr. Act 1898, par. 2, cl. 7, as limited by section 23 b, a district court,

as a court of bankruptcy, has original jurisdiction of actions by trustees in bankruptcy to recover property alleged to belong to the estate of bankrupt, against third persons claiming title thereto adversely to the bankrupt or in hostility to the trustee, provided the cause of action is one which did not originally exist in the bankrupt himself, and also of all actions brought in such court against a trustee in bankruptcy by adverse claimants.

"We think it should have that effect, not only because its language warrants it, but also because that construction is demanded by expediency and convenience. Bankruptcy courts ought, in the interests of promptitude and uniformity of decision, to have original jurisdiction to entertain and adjudicate all controversies which affect the administration of the assets in their custody. We therefore decide that by clause 7 of section 2, the District Court, as a court of bankruptcy, has original jurisdiction to determine all controversies brought to it by a trustee, where the cause of action did not originally exist in the bankrupt, against a person asserting a hostile title to the bankrupt's property."

In re Baudouine, 101 Fed. 574 and 575 (C. C., N. Y.).

"I am bound to follow the ruling of our Circuit Court of Appeals (*In re* Baudouine, 3 Am. Bankr. Rep. 651, 655, 101 Fed. 574, 42 C. C. A. 318), and inasmuch as this action in equity could not have been brought by the bankrupt, even though separate actions at law might have been main-

tained against these several defendants, to sustain the jurisdiction."

Skillin v. Magnus, 162 Fed. 689.

There are no decisions to the contrary so far as counsel have been able to learn, and none were pointed out by the respondent at the hearing in the court below.

The following texts are in accord with the foregoing decisions:

"Compliance with the call may be enforced by a suit in equity in the federal district court in which the estate of the bankrupt corporation is being administered, or the trustee may proceed against the stockholders severally in the proper state courts."

Black on Bankr., Sec. 148.

"A court of bankruptcy has jurisdiction of a proceeding by the trustee of a bankrupt corporation to have an assessment made on the unpaid stock; and of a suit in equity by the trustee of a bankrupt corporation against a number of subscribers to the corporate stock to recover their unpaid subscriptions."

7 Corpus Juris, 255.

Appellant is fully aware that text writers generally, in works on bankruptcy, do not accede to the view of the law taken by appellant herein, but the arguments advanced by those writers are not as well reasoned as are those of the courts whose decisions are quoted here. Text

writers generally seem to express their views of the law upon a casual reading of section 23, and an assumption that a plenary suit brought by the trustee must necessarily be a suit which the bankrupt could have brought, and upon the further assumption that a plenary suit must necessarily be a controversy, both of which assumptions we shall see are false.

II.

That It Is a Proceeding in Bankruptcy to Reduce the Assets of the Bankrupt to Possession, and as Such Within the Jurisdiction of the District Court.

The right of the trustee to assert against the stockholders a demand for the unpaid balance due on the stock of a bankrupt corporation is not unlike the right of a trustee to take over the personal estates of the members of a bankrupt partnership for the purpose of satisfying the debts of the partnership. It has been said that the stockholders of a corporation after adjudication in bankruptcy are likewise before the court for all purposes *inter se*.

> "The corporation is within the jurisdiction of the court, and its officers, directors and stockholders, insofar as their dealings

with the bankrupt are concerned are amenable to its authority."

Remington on Bankr., p. 268;

Loveland on Bankr. (4th Ed.), p. 809;

In re Monarch Corporation, 196 Fed. 252.

"As a stockholder she was an integral part of the corporation. In the view of the law she was before the court in all the proceedings touching the body of which she was a member."

Sanger v. Upton, 91 U. S. 56;

Hawkins v. Glenn, 131 U. S. 319, 329.

If the stockholders are an integral part of the corporation as said above, then the bankruptcy court has jurisdiction to determine all questions affecting their interests and the call for the unpaid balance due upon the capital stock is a proceeding in bankruptcy (Sanger v. Upton, *supra*) and the suit for its enforcement is but a continuation of that proceeding under the jurisdiction granted by section 2, subd. 6, to "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy."

It will be noticed that the limiting clause at the conclusion of subdivision (7) grammatically limits and determines only the preceding clause of subdivision 7, that is, to "determine con-

troversies in relation thereto," meaning to the property composing the estate. It does not limit the power of the court to "cause the estates of bankrupts to be collected, reduced to money and distributed," which precedes the clause with reference to determining controversies in relation to the property of the bankrupt, nor the right of the bankruptcy court to bring in additional parties as provided for in subd. 6. Insofar as proceedings are necessary to "cause the estate to be collected, reduced to money and distributed" or "to bring in and substitute additional parties in proceedings in bankruptcy," there are no qualifications put upon the jurisdiction of the bankruptcy court.

In order that there may be a controversy in relation to the estate of the bankrupt and within the provisions of sec. 23 b, there would necessarily be an adverse claimant; to be considered an adverse claimant, one would have to be a stranger to the proceedings,—for instance, the bankrupt himself would not be considered an adverse claimant and partners would not be adverse claimants to the partnership; the stockholders are an integral part of the corporation, the corporation is the bankrupt, therefore, the stockholders are not adverse claimants, and this is not a controversy within the meaning of sec. 23.

If the bankrupt had money in the bank which

he refused to turn over to the trustee, the District court would have jurisdiction of any proceedings adopted to compel him to turn over such moneys; or if in a partnership, the trustee sought to reduce to his possession the individual estates of the partners, such would be a proceeding in bankruptcy. In the case at bar the capital stock of the corporation is a trust fund for the payment of its debts; Sanger v. Upton, 91 U. S. 56; Patterson v. Lynde, 106 U. S. 519; Hawkins v. Glenn, 131 U. S. 319; that trust fund by the adjudication in bankruptcy is impounded, equitably attached, and now is in *custodia legis;* Whitney v. Wenman, 198 U. S. 552; it is immaterial that by a contractual arrangement the stockholder has the actual money in his possession, for the fund is actually, and the money, constructively in the hands of the court, and this is merely a proceeding to reduce it to actual possession. The possession of the money and the refusal to pay the same over do not thereby constitute the subscribers adverse claimants.

> "The position now taken amounts to no more than to assert that a mere refusal to surrender constitutes an adverse holding in fact and therefore an adverse claim when the petition was filed, and to that we cannot give our assent."
>
> Mueller v. Nugent, 184 U. S. 1, 15.

The Bardes case cited by the court below in its written opinion, is thought by some to hold to the contrary, but such is not the case. There the action was against strangers to the proceeding holding adversely under color of right and a proceeding which might have been brought by the bankrupt. The effect of that decision is no longer noticeable by reason of the amendments to the Bankruptcy Act, and the limitations placed upon it by later decisions of this Honorable Court.

> "This case (Bryan v. Bernheimer, 181 U. S. 188) would seem to limit the effect of the decision in the *Bardes Case* to suits against third persons on account of transfers made before the bankruptcy, and to recognize the right of the bankruptcy court to adjudicate upon rights in property in the possession of the court, belonging to the bankrupt. In the case of *Mueller v. Nugent,* 184 U. S. 1, 46 L. Ed. 405, 22 Sup. Ct. Rep. 269, this court recognized the power of the bankruptcy court to compel the surrender of money or other assets of the bankrupt in his possession or that of some one for him. In that case the decisions in *Bardes v. First Nat. Bank, White v. Schloerb* and *Bryan v. Bernheimer* were reviewed by the chief justice, who delivered the opinion of the court, and it was held that the filing of a petition in bankruptcy is a *caveat* to all the world, and, in effect, an attachment and injunction, and that, on adjudication, title to the bankrupt's estate became vested in the trustee, with actual or

constructive possession, and placed in the custody of the bankruptcy court.

"We think the result of these cases is, in view of the broad powers conferred in section 2 of the Bankrupt Act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money, and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same, and the extent and character of liens thereon or rights therein. This conclusion accords with a number of well-considered cases in the Federal courts. *Re Whitmer*, 44 C. C. A. 434, 105 Fed. 180; *Re Antigo Screen Door Co.*, 59 C. C. A. 248, 123 Fed. 249; *Re Kellogg*, 57 C. C. A. 547, 121 Fed. 333."

Whitney v. Wenman, 198 U. S. 552, 553.

Because it becomes necessary according to some authorities to bring a plenary, rather than a summary, proceeding, that fact, if such it be, will not oust the jurisdiction of the District Court.

3 R. C. L. 182;
Whitney v. Wenman, 198 U. S. 539;
Rittenberg v. Schaefer, 131 Fed. 313;
Clay v. Waters, 178 Fed. 385;
Loeser v. Savings Bank, 163 Fed. 212.

Subdivision 15 of section 2, gives that court the power to "make such orders, issue such process, and enter such judgments, in addition to those specifically provided for as may be necessary for the enforcement of the provisions" of the act, and the concluding paragraph of section 2, as amended, specifically provides "nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess, were certain specific powers not herein enumerated."

Hence, the fact that each stockholder must be subpoenaed and have his opportunity to be heard in a plenary rather than a summary way does not necessarily change the case at bar from a "proceeding in bankruptcy" to a "controversy" in relation to the property of the bankrupt estate, for the court, under subdivision 15, has power to issue any process and enter any judgments, and necessarily must have jurisdiction of all proceedings intervening between those two acts that may be necessary to cause the estate to be collected and reduced to money.

> "Nor can we perceive that it makes any difference that the jurisdiction is not sought to be asserted in a summary proceeding, but resort is had to an action in the nature of a plenary suit, wherein the parties can be fully heard after the due course of equitable proceedings."
>
> Whitney v. Wenman, 198 U. S. 539.

It is to be here noted that there might be cases of the bankruptcy of corporations wherein the assets would be sufficient to satisfy all the debts, and therefore no call for the unpaid balance due on the stock subscriptions could be made, while in other proceedings, as in this one, a condition exist which authorized the bankruptcy court to call in the unpaid balance due on the capital stock of the corporation. Strictly speaking, then, the action is not one upon the contract of subscription, but upon the necessity of the case.

As we noted under the preceding point, the right of the trustee to institute such a proceeding in equity as is here presented to the court is a right created by the Bankruptcy Act itself, and it necessarily follows that such a suit is a proceeding in bankruptcy, as distinguished from a controversy within the meaning of the Act, for it is a right, and a proceeding, that exists by virtue of the Bankruptcy Act alone.

Conclusion.

Assuming, for the moment, that this is a controversy as distinguished from a proceeding in bankruptcy, it may be said that the Bankruptcy Act, being a Federal enactment, and providing as it does, by section 2, that the Federal courts shall have general jurisdiction of the administration of that act, that except where that juris-

diction is expressly limited by its terms, the District Court should assert and retain jurisdiction of all acts and proceedings growing out of such administration. The only limitation upon the jurisdiction of the District Court expressed in the act upon the bringing of suits by the trustee is that contained in section 23-b, which is limited to such proceedings as the bankrupt might have brought. Nowhere in the act is there any limitation as to suits which might have been brought by the creditors. The suit here is one in the nature of a creditor's bill, and therefore not within the exception in 23-b, or any other exception contained in the act. Section 23-a does not relate to a creditor's bill, for that subdivision is clearly limited to controversies between the trustee, as representative of the bankrupt, and adverse claimants. The creditor's bill is a controversy between the trustee, as representative of the creditors, and the adverse claimants, if such they be, and therefore not within section 23-a. It is not a suit the bankrupt might have brought or prosecuted.

On the other hand, as we have seen, this suit, being between the trustee and persons composing the bankrupt corporation, is strictly a proceeding in bankruptcy as distinguished from a controversy relative to the property of the estate of the bankrupt, and therefore not within the terms of section 23-b, but by the terms of

section 2, exclusively within the jurisdiction of the District Court.

The court below, in its written opinion, after a statement of the facts, opens its discussion of the law of the case with the following [Trans. p. 9]:

"Individually, for reasons of economy, efficiency and convenience, adverted to *In re* Boudouine, 101 Federal 576, 577, I have felt that the law ought to be such that this court should be vested with jurisdiction of such a case as this."

The most important reason, in our opinion, for the assertion and retention of jurisdiction in matters pertaining to bankruptcy proceedings by the said court is for the greater uniformity of decisions affecting the Bankruptcy Act.

No court has occasion more often to consider the variety and shades of opinion that can be given a principle of law by the forty-eight state jurisdictions of our country than this Honorable Court itself. If the Bankruptcy Act, national legislation for the conduct of a class of proceedings entirely statutory, is to be construed and partially administered by the courts of forty-eight states, we may expect a variety of construction and administration equal to that of any principle of law or statutory enactment.

This act is intended for the relief of debtors of the nation, and is intended to be administered along exactly the same lines, and to the same ends, in each of the forty-eight states, and it is a matter of the greatest importance, to the end

that justice may be done, that the same construction be given the Act in each proceeding, in every state, to the large and to the small bankrupt, and to the large and to the small creditor. To this end it is important that the Federal courts assert and retain jurisdiction as far as possible of all controversies in connection with the administration of the estate, unless any thereof shall clearly come within the exclusive jurisdiction of the state court.

The bankruptcy court has before it the affairs of the bankrupt; its knowledge of the necessities of the case is complete. It has jurisdiction of the creditors, of the bankrupt, the trustee, and all persons, claims against, and property of the bankrupt; it has equitable jurisdiction broad enough to cover every contingency; no stockholder will be obliged to pay more than his just burden, and no creditor can reap any untoward advantage; in a word, all equities can be adjusted in the one proceeding to the end that justice may be done to all. If state jurisdiction be permitted to intermingle the diverse views of the courts of the forty-eight states, the ends to be attained by the law cannot be expected to have that uniform equitable accomplishment designed for it, nor would the state courts have before them the parties or the facts to enable them to mete out justice to all.

Respectfully submitted,

WM. B. OGDEN,

RALPH E. ESTEB,

Solicitors for Appellant.

(26,778)

REPLY BRIEF OF APPELLANT.

SUPREME COURT

OF THE

UNITED STATES.

October Term 1916.

No. [redacted] 411

[redacted]

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term 1916.

No. 948.

S. F. Kelley, Trustee of the Gibraltar Investment and Home Building Company, Bankrupt,

Appellant,

vs.

Thomas Gill,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

REPLY BRIEF OF APPELLANT.

The brief of the appellee follows the outline of appellant's opening brief and discusses the points made in the same order as did appellant. As to the answer of appellee to the first point made, we do not consider any of the authorities

cited by counsel not already noticed by appellant as meriting discussion, and we therefore pass at once to the answer to our second point.

In the discussion of the second point, *appellee concedes* in the opening paragraph *"that the bankruptcy court has jurisdiction to issue and enforce a call* upon the shareholders of the bankrupt corporation for unpaid subscriptions, ratably fixing the amount chargeable against each shareholder, so as to provide a fund sufficient to liquidate the unpaid debts of the bankrupt" (Appellee's brief, p. 5), but contends that the case at bar is not such a proceeding and attempts to distinguish the case by arguing from the fact that appellant has alleged the contract in his bill of complaint that the cause of action in the case at bar is one based upon that contract and not one falling within the above conceded statement of law.

Let us pause here and review hastily the proceedings in the case at bar in order that we may judge whether the proceedings here come within the class of proceedings which counsel admit are within the jurisdiction of the bankruptcy court. It appears from the bill of complaint that the corporation was adjudged a bankrupt on the 14th day of August, 1915 [Tr. p. 5,] and that appellant here is the trustee of the estate of the bankrupt. That on the 25th day of Feb-

ruary, 1916, the bankruptcy court, upon petition, made and entered an order that the stockholders of the bankrupt pay into the hands of the trustee the whole of the unpaid balance due from them on stock in said corporation on or before March 20, 1916, and that notice of the making of said order was served upon each of said subscribers by mail and also by publication of the order in a newspaper. [Tr. p. 5.] That the stockholders, mentioned in the bill of complaint, notwithstanding said order and notice, have failed, refused and neglected to pay the said amounts [Tr. p. 6,] and that the trustee *"brings this bill under section 2 of the United States Bankruptcy Act of 1898 and the amendments thereof to enforce the order of this court dated February 25, 1916."* [Tr. p. 4.]

The statement of the foregoing proceedings makes it plain that the cause of action is not the subscription contract, but on the contrary, the cause of action is the *order* of February 25, 1916, commonly designated the call, made by the bankruptcy court, and based upon *the necessity of the case*. We advanced this point in our opening brief without enlarging upon it, as we took it to be a self-evident fact. It is true it was necessary to allege the existence of the contract, as it also was necessary to allege the appointment of the appellant as trustee, and

for the same reason, to-wit, to establish the capacity or relation of the party to the proceeding—to show in what manner, the call having been made, it affected the appellee.

It is now well settled law that whenever it is made to appear that a corporation is insolvent, or for any other reason has become unable to carry out the objects and purposes for which it was incorporated, that neither it, nor its assignee, can enforce the payment of subscriptions to stock. Nor can a trustee in bankruptcy enforce the payment of such subscription after the corporation has been adjudged a bankrupt. It is also true that *the call* can only be made *by the bankruptcy court*, and that, as said in *Sanger v. Upton*, cited in our opening brief, such call is a proceeding in bankruptcy. It would therefore seem to follow that if no cause of action exists against the stockholders until after a call has been made by the bankruptcy court, that the action is based, *not upon the contract, but upon the call*, and that it is a proceeding in bankruptcy,—a proceeding, as we said in our opening brief, arising from and based upon *the necessity of the case*.

That the action is not based upon the contract is also evident from the fact that there might exist proceedings in bankruptcy where *the necessity* might not arise justifying the call,

and in such a case the trustee would have no cause of action against the stockholders whatsoever, notwithstanding the existence of large sums due upon unpaid subscription contracts.

Nor can the proceedings here be said to be based upon the contract, as stated by the appellee, because the stockholder has the right to interpose all the defenses in this suit that he would have had in a suit by the bankrupt upon the subscription contract. The argument is untenable for two reasons; first of which is, that he does not have the right claimed, and, second, because if he did possess that right, it would not demonstrate that the causes of action were the same. It has been held many times that after adjudication in bankruptcy, the subscriber to stock loses all save three of his defenses, viz., (1) a personal defense, such as minority; (2) that he is not a subscriber to the stock of the corporation; and (3) that he has paid in full. All other defenses, such as fraud, misrepresentation, *et cetera,* when made for the first time after adjudication, are of no avail, so the analogy and deduction attempted to be made by appellee fails upon being put to his own test.

The case of *Park v. Cameron,* cited by appellee is not analogous to the case at bar, because the cause of action there was fraud, and the fraud was nothing that grew out of the

defendants' relation to the corporation, or their capacity as stockholders or directors, or to their character as an integral part of the corporation, but rather notwithstanding that relation. The cause of action would have existed quite as clearly if the defendants had been strangers to the corporation and had committed a similar fraud upon it. In other words, it would have been no defense to the action to have denied that they were stockholders.

We therefore re-assert that this is not such an action as the bankrupt might have brought, and is a proceeding in bankruptcy, and for both reasons equally within the jurisdiction of the District Court.

Respectfully submitted,

WM. B. OGDEN,

RALPH E. ESTEB,

Solicitors for Appellant.

RESPONDENT'S BRIEF

SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1916

No. [redacted]411

S. F. KELLY Trustee of the Gibraltar Investment and Home Building Company, Bankrupt,
Appellant,
vs.
THOMAS GILL,
Respondent.

Appeal from the District Court of the United States for the Southern District of California.

WILLIAM CHA MORTON
PORTER C. BLACKBURN
A. L. ABRAHAM.
Solicitors for Respondent

Grant Publishing House, Printers, 233 Broad Street, Los Angeles, California

IN THE

SUPERIOR COURT

OF THE

UNITED STATES

OCTOBER TERM, 1916

No. 948

S. F. KELLY Trustee of the Gibraltar Investment and Home Building Company, Bankrupt,

Appellant,

vs.

THOMAS GILL,

Respondent.

RESPONDENT'S BRIEF

This matter is before the Court upon the question of jurisdiction, and the attorneys for the appellant have advanced two theories from which they argue that the United States Courts have jurisdiction of the issues involved, first;

"IT IS SUCH A SUIT AS THE BANKRUPT MIGHT HAVE BROUGHT HAD THE BANKRUPTCY PROCEEDINGS NOT BEEN INSTITUTED."

That this is an action to enforce collection of unpaid balances due by various subscribers to the capital stock of the bankrupt corporation under the terms of their contracts of subscription, is fixed by the Bill of Complaint. Paragraph VI of the Complaint, appearing at the bottom of page 4 and the top of page 5 of the Transcript of Record, filed herein, shows the cause of action to be based upon contract.

It is quite unnecessary to argue that the bankrupt corporation, had the bankruptcy proceedings not been instituted, could have maintained actions for the recovery of the identical amounts sought to be recovered herein and that the United States Courts would not have had jurisdiction in those actions. The argument of appellant's counsel, therefore, resolves itself into the contention that because the present action is cast in the form of a Bill in Equity and admittedly the Bankrupt would have been relegated to several actions at law, the United States Court has jurisdiction under Section 23 B of the Bankruptcy Act. The language of that section does not admit of any such construction. The legislative

intent to limit the jurisdiction of the United States Courts to proceedings for the enforcement of causes of action peculiar to the trustee, is clear, and the purpose to leave unchanged the jurisdiction respectively of the United States and the State courts as to causes of action existing in favor of the Bankrupt is apparent and evidently for the benefit of the defendants in such actions.

This Court in Bardes vs. Hawarden Bank, 178 U. S. 524, conclusively settled this question, using the following language at page 538:

> "On the contrary, Congress, by the second clause of Section 23 of the present bankrupt act, appears to this Court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy, to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the district courts of the United States 'unless by consent of the proposed defendant,' of which there is no pretense in this case."

The cause of action stated in the Bill of Complaint clearly makes the plaintiff's right to recover dependent upon the right which the bankrupt had to recover from the various defendants at the time of the institution of the bankruptcy proceedings, and beyond cavil the Trustee relies upon no rights specially conferred

upon him under the Bankruptcy Statutes. If the cause of action existed in favor of the Bankrupt against the defendant Gill, the same cause of action, by operation of law, was vested in the Trustee upon his appointment. If no cause of action existed in favor of the Bankrupt against the defendant Gill, then no cause of action existed in favor of the Trustee.

This Court in Lowell, etc., vs. Newman, etc., 227 U. S. 412, 33 Sup. Ct. Rep. 375, at page 379, applies this test, using the following language:

> "The Trustee, for his recovery upon the bond, did not reply upon any right specially conferred upon him under the Federal Statute which was the subject of controversy, and therefore a ground of jurisdiction. He sued to recover upon the bond solely because of his claim that the 1,311 bales of cotton were at the time of the bankruptcy proceedings, the property of Knight, Yancy & Company."

And again at page 379:

> "It therefore appears that the action, as outlined in the petition, made the plaintiff's right to recover depend upon the ownership of the property by the bankrupt as its own before the bankruptcy proceeding. The investigation of this question involved only matters of general law, and did not depend upon any right conferred by the bankrupt act upon the Trustee."

See also:

Harris vs. First Nat. Bank, 216 U. S. 382.
Call vs. Cox, 181 U. S. 244, 247.

Brandenburg on Bankruptcy, Sections 406, 407, 409.

Collier on Bankruptcy, page 489
Remington on Bankruptcy, Sec. 1694
Lovejoy on Bankruptcy, Page 1045

We therefore submit that the cause of action sought to be enforced herein by the Trustee, is a cause of action existing in favor of the Bankrupt before the bankruptcy proceedings were started, and consequently one which can be enforced by the Trustee only in the courts having jurisdiction as between the bankrupt and the adverse party.

The second contention advanced by counsel for the Appellant is:

> "THAT IT IS A PROCEEDING IN BANKRUPTCY TO REDUCE THE ASSETS OF THE BANKRUPT TO POSSESSION, AND, AS SUCH, WITHIN THE JURISDICTION OF THE DISTRICT COURT."

In support of that contention counsel cites a line of authorities which hold that the Bankruptcy Court has jurisdiction to summarily issue and enforce a call upon the shareholders of the bankrupt corporation for unpaid subscriptions, ratably fixing the amount chargeable against each shareholder, so as to provide a fund sufficient to liquidate the unpaid debts of the bank-

rupt. We grant that this is the law. That line of authorities, however, is readily distinguishable from the situation confronting us in the case at bar. Those cases rest upon the doctrine that the officers, directors and stockholders of a corporation are subject to the jurisdiction of the court which has acquired jurisdiction over the corporation itself in all matters strictly and peculiarly within the relationship created by the corporate organization. In the case at bar the rights sought to be enforced depend upon contract, as unmistakably appears from the Bill of Complaint. The right to recover depends upon, and the amount of recovery is measured by, the respective contracts of each respondent.

This Court in Park vs. Cameron, 237 U. S. 616, decided that the United States Courts had no jurisdiction upon a bill of complaint alleging the misapplication and misuse of funds of the bankrupt corporation by individuals who were not only stockholders, but directors of that corporation, the alleged facts being "That defendants, being directors, conspired with one Kirksey, the General Manager, and induced him to make a pretended purchase of the stock, but really for the corporation, and upon a payment of $8250 of the corporation funds." While the Court does not discuss the effect of the relationship between

the bankrupt and the defendants in that action, they effectively settle the question.

This action is no more a part of the administration of the bankrupt's estate and the reduction of the assets to possession than any other action against any debtor of the bankrupt. The respondents herein have the right to assert such defenses as they may be advised they have against the claim of the Trustee with the same force and effect that they might have asserted such defenses had an action been brought by the bankrupt itself, and the Trustee seeks to enforce only the contractual obligation of each respondent. Neither the right to recover nor the obligation depends upon the relationship of the respondents to the Bankrupt corporation as its shareholders; the liability, if any, depends solely upon the contract, and the alleged promise to pay therein. The cause of action is not broadened or strengthened by the allegation that the respondents are shareholders.

We respectfully submit that this is not a proceeding in bankruptcy to reduce the assets of the bankrupt to possession, and that it is clearly an action to enforce an alleged contractual liability existing between the defendant and the bankrupt prior to the institution of the bankruptcy proceedings, and that under Section 23 B of the

Bankruptcy Act suit can only be brought or prosecuted in the court where the bankrupt whose estate is being administered might have brought or prosecuted it had proceedings in bankruptcy not been instituted.

Respectfully submitted,

WILLIAM ONA MORTON,
PORTER C. BLACKBURN,
A. L. ABRAHAMS,
Solicitors for Respondent.

KELLEY, TRUSTEE OF THE GIBRALTAR INVESTMENT AND HOME BUILDING COMPANY, BANKRUPT, *v.* GILL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 411. Submitted October 2, 1917.—Decided November 5, 1917.

A court of bankruptcy has no jurisdiction over a suit in equity brought by the trustee of a bankrupt corporation in the State of the corporation's domicile, against a number of its shareholders there residing, for the purpose of collecting from each an ascertained sum of money which by the terms of such shareholder's individual subscription contract had become unconditionally due and payable to the corporation at times specified and without regard to the obligations of other shareholders.

Where the liabilities of the shareholders of a corporation to pay stock subscriptions are several, independent, and unconditional, and no issue with the corporation touching such liabilities is common to the shareholders, the remedy of the corporation, or its trustee in bankruptcy, is by action at law against each shareholder separately; the equitable jurisdiction to avoid multiplicity of actions does not arise merely because the claims are very numerous; and a single

116. Counsel for Parties.

suit by the corporation, or by its trustee in bankruptcy, against many of the shareholders, to collect their subscriptions, cannot be maintained on that ground.

An order of the court of bankruptcy, calling for the payment of shareholders' subscriptions to a bankrupt corporation which, before and independently of the order, were ascertained and payable, adds nothing to the liabilities of the shareholders or to the rights of the trustee in bankruptcy, and cannot justify a single suit by the trustee against many of the shareholders to collect their subscriptions which, in the absence of the order, would not have been cognizable in equity; and neither can an order of the bankruptcy court directing the trustee "to institute a suit in equity" to make such collections confer such equitable jurisdiction.

The amendment to § 47, clause (2) of subdivision *a* of the Bankruptcy Act, made by the Act of June 25, 1910, 36 Stat. 840, § 8, did not confer new means of collecting ordinary claims due the bankrupt.

Where causes of action and citizenship of parties are such that a bankrupt, before bankruptcy, could have sued only in a state court, the bankruptcy court is without jurisdiction to enforce them at the suit of the trustee, even if as a matter of equity jurisdiction the trustee might join all causes in one bill to prevent a multiplicity of suits, while the bankrupt would have been obliged to sue upon each of them independently at law.

Contested claims of a bankrupt corporation against persons alleged to be shareholders, for moneys alleged to be due and payable on subscriptions to the corporate stock, are not to be regarded as property in the possession of the trustee in bankruptcy for the purpose of determining whether the bankruptcy court has jurisdiction to enforce them; nor does the fact that such alleged debtors are shareholders of the corporation enable the trustee to sue them in that forum to collect their subscriptions.

238 Fed. Rep. 996, affirmed.

THE case is stated in the opinion.

Mr. Wm. B. Ogden and *Mr. Ralph E. Esteb* for appellant.

Mr. William Ona Morton, Mr. Porter C. Blackburn and *Mr. A. L. Abrahams* for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Gibraltar Investment and Home Building Company, a California corporation with a capital stock of $2,000,000 divided into 20,000,000 shares of ten cents each, was adjudicated a bankrupt in the Southern District of that State. Its debts were about $150,000. Its assets consisted of amounts aggregating $480,971.23 unpaid and overdue on subscriptions to its stock. The subscription of each stockholder was contained in a separate contract which provided for payment unconditionally at specified dates. The court of bankruptcy found that a large majority of the subscribers were non-residents of the district or were insolvent and that the full amount due from resident solvent stockholders would be required to pay the claims of creditors and the cost of administration. It ordered payment of all unpaid subscriptions and directed the trustee in bankruptcy "to institute a suit in equity" to enforce collection thereof. Such a suit was brought in that court against Gill and about 3,000 other residents of the district. A motion to dismiss for want of jurisdiction was sustained; and a decree was entered dismissing the bill. (238 Fed. Rep. 996.) The case comes here on appeal under § 238 of the Judicial Code.

The question presented is of importance in the administration of bankrupt corporations. To enable the trustee, by means of a single suit in the court of bankruptcy, to determine and enforce payment of all amounts due from stockholders would obviously promote the effective administration of the bankrupt estate; but the aggregate burden thereby cast upon the individual stockholders might be correspondingly heavy. Whether the right to choose the court and the place in which litigation shall proceed should be conferred upon the trustee or upon the defendant, is a legislative question with which Con-

gress has dealt in the Bankruptcy Act (1898, c. 541, 30 Stat. 544). Section 2, clause 7, confers upon the court of bankruptcy jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." But § 23-b prohibits the trustee (with exceptions not here applicable) from prosecuting, without the consent of the proposed defendant, a suit in a court other than that in which the bankrupt might have brought it, had bankruptcy not intervened.[1] The corporation is a citizen of California. It could not have sued these stockholders except in the state courts. The court of bankruptcy was, therefore, without jurisdiction of this suit unless there is something either in the nature of the cause of action or in the relation of stockholders to a corporation or in the character of the suit, which prevents the application of the prohibition contained in § 23-b.

The trustee seeks to sustain the jurisdiction on the ground:

First: That the suit—a bill in equity against all resident stockholders—is not one which the corporation could have brought "if proceedings in bankruptcy had not been instituted"; and that a right to bring it arises in the trustee under the amendment of 1910 to § 47, Clause *a* (2).[2]

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[1] The Bankruptcy Act of 1867 as amended conferred expressly upon the federal courts jurisdiction of actions by the assignees for the collection of debts owing the bankrupt or other assets. *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 531. And independently of any statute, a receiver of an insolvent corporation, appointed by a federal court on a judgment creditor's bill under its general equity jurisdiction, had been held in 1895 entitled to sue a debtor of the corporation in that court on the ground that the proceeding was ancillary. *White* v. *Ewing*, 159 U. S. 36.

[2] 1910, c. 412, § 8 (36 Stat. 840).

"Sec. 8. That section forty-seven, clause two, of subdivision *a* of

Second: That the suit is a proceeding concerning property in the actual or constructive possession of the trustee or the bankrupt.[1]

The cause of action sued on is the failure of the several stockholders to perform their several unconditional promises to pay definite amounts at fixed times which have elapsed. The amount payable by one is in no way dependent upon what is due from another. The corporation had a separate right against each alleged stockholder; and the remedy open to it was a separate action at law against each. The trustee rightly assumes that the corporation could not have brought a single suit in equity against all these stockholders, although a very large number of actions at law would be required to make collection of the balances unpaid on the stock. There was no common issue between these alleged stockholders and the corporation; and the liability of each would have presented a separate controversy unconnected with that of any other. Thus elements essential to jurisdiction in equity to avoid multiplicity of actions at law by the corporations were lacking. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McKnight*, 244 U. S. 368, 375.[2] That

said Act as so amended be, and the same hereby is, amended so as to read as follows:

"Collect and reduce to money the property of the estate for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest: and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

[1] See *Mueller* v. *Nugent*, 184 U. S. 1; *Whitney* v. *Wenman*, 198 U. S. 539, 552.

[2] In *White* v. *Ewing*, 159 U. S. 36, 38, where this court was requested, on certificate from the Circuit Court of Appeals, to answer a question

lack is not supplied by the assignment to the trustee. No other property has become involved. No new issues have been raised. The order of the court of bankruptcy that subscriptions be paid up was not a condition precedent to the existence of the causes of action against the several stockholders; and it added nothing to the rights which had already passed to the trustee. For him, also, the appropriate remedy was a separate action at law against each stockholder. The amendment of 1910 to § 47 of the Bankruptcy Act did not confer new means of collecting ordinary claims due the bankrupt; and the order directing the trustee "to institute a suit in equity" was impotent to confer equity jurisdiction.

But even if there had been equity jurisdiction, the suit could not have been brought in the federal court. The cause of action sued on would still have been the broken promise of the individual stockholder to pay the balance on his stock. That was a cause of action on which the bankrupt could have sued and sued only in the state court. The cause of action would remain the same, although equity, to avoid multiplicity of actions at law, undertook to deal with three thousand separate claims in a single suit. The mere fact that the bankrupt could not have brought the particular suit would not confer on the court of bankruptcy jurisdiction of the suit of the trustee. *Bardes* v. *Hawarden Bank*, 178 U. S. 524.

Nor can the jurisdiction of the court of bankruptcy be maintained on the ground that this is a suit brought to determine a controversy concerning property in the possession of the trustee. He had possession merely of contested claims against alleged stockholders. Many

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arising in an ancillary suit similar in character, brought by a receiver, the opinion of the court called attention to the fact that "no exception was taken to the form of the bill by demurrer or otherwise, but defendants answered, denying liability"; and the fact had been also noted by the Circuit Court of Appeals. (66 Fed. Rep. 2.)

of the defendants may prove not to be stockholders. And even those confessedly stockholders are, in respect to the matters in controversy, as much strangers to the corporation and to the estate as any other person against whom the corporation had a cause of action. The fact that an alleged debtor of a corporation is a stockholder, or even an officer, does not enable the trustee to sue him in the court of bankruptcy. *Park* v. *Cameron*, 237 U. S. 616.

We have no occasion to consider whether a different rule applies in those cases where an order of the court of bankruptcy is a condition precedent to the existence of any liability, either because stockholders are liable only after a call, or because the liability of stockholders is *pro rata* and limited to such sums as may, in the aggregate, be necessary to satisfy the claims of creditors.

Decree affirmed.